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FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)

Review of the Pioneer's
 Preference Rules)

ET Docket No. 93-266

To the Commission

REPLY COMMENTS OF CABLEVISION SYSTEMS CORPORATION

Cablevision Systems Corporation ("Cablevision"), by its attorneys, hereby submits its reply comments with respect to the Commission's Notice of Proposed Rulemaking in the above captioned proceeding.

INTRODUCTION AND SUMMARY

In its initial comments, Cablevision generally supported retention of the Commission's pioneer's preference policies, based upon the continuing importance of two of the original goals of these policies, creating incentives for innovation and rewarding successful innovators. At the same time, Cablevision recognized that the policies have not always worked well in practice, but expressed its hope that one important procedural modification proposed in the NPRM would ameliorate the practical difficulties associated with a basically sound policy.

Specifically, the Commission's experience with the pioneer's preference in the broadband PCS proceedings have highlighted the difficulties associated with identifying successful innovators, whose innovations will withstand the test of time and actually play an important role in the implementation of a service. By

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conducting initial analysis of pioneer's preference requests prior to the first important stage of implementing a service, i.e., prior to the issuance of a Notice of Proposed Rulemaking for the service, Cablevision believes that the Commission has granted undue weight to very preliminary, excessively hyped "firsts," the bulk of which now appear to have little relevance for PCS as most people envision it. Cablevision also believes that this process disfavors true pioneers who, like Cablevision, eschewed quick results in favor of a comprehensive and systematic approach to development of technology which can support a commercially viable PCS service. The announcement of tentative pioneer preferences at an early stage of the proceedings may also create an inertia in favor of the tentative awardees, even as the evolution of the service and underlying technologies have left any number of "pioneering" innovations behind.

This unfortunate experience, however, should not lead the Commission to abandon its attempt to create incentives for true technological innovation, but rather calls for the fine-tuning suggested by the NPRM. In the context of broadband PCS, Cablevision agrees with a significant number of commentators that abolishing pioneer preferences entirely, after having induced the substantial number of parties who have participated in experimentation with PCS to undertake such efforts in the hopes of gaining a pioneer preference, would be manifestly unjust and probably illegal. Nonetheless, this should not stop the Commission from exercising the utmost care in scrutinizing its

individual tentative awards, and also its tentative decisions to deny pioneer preferences, to reach the most sound application of these policies. If the Commission is to retain pioneer's preferences, it must take the hardest possible look at claimed innovations to ensure that the Commission is actually rewarding useful and important efforts. The Commission, of course, always retains the right not to award preferences in individual proceedings.

In addition to the benefits identified by Cablevision in its comments, the other comments filed in this proceeding provide a compelling record in support of the conceptual soundness of the Commission's pioneer's preference policies. Cablevision agrees with a number of commentators that the pioneer's preference procedures have fostered an environment of extraordinary openness which has not only substantially advanced the pace at which PCS will become a commercially viable service, but has also permitted the Commission to develop its rules based upon the most extensive information available. Cablevision also believes that the comments overwhelmingly demonstrate that the pioneer's preference policies create important incentives for the development of new and innovative technologies.

In its comments, Cablevision also argued that, in the context of broadband PCS, the most appropriate award, in order to preserve incentives, while not granting pioneers a windfall, would be a 20 MHz basic trading area license. This position finds substantial support in the initial comments.

I. The Initial Comment Overwhelmingly Support Cablevision's Position That Pioneer's Preferences Are Necessary To Spur And Reward Innovation

In its comments, Cablevision disputed the apparent underlying premise in the NPRM that the advent of competitive bidding had eliminated the policy justifications for the pioneer's preference. Cablevision argued that, in addition to guaranteeing participation by pioneers, the more compelling justifications for the policies were the need to create additional incentives for innovation, and to reward those who develop truly important innovations. The initial comments generally support Cablevision's views of the continuing importance of these objectives, and of the need for pioneer's preferences to fulfill them. The most compelling testimony is provided by many entrepreneurial companies, whether participating in services such as PCS, where tentative decisions have already been made, or in other new services where the pioneer's preference process is yet to begin.

The comments also highlight an additional justification for the grant of pioneer's preferences. A number of parties persuasively argue that the process of considering pioneer's preference requests has fostered an environment of unprecedented openness by the participants in discussing the technological alternatives and the commercial realities of new services, particularly with respect to PCS.^{1/} Cablevision agrees that

^{1/} See Comments of Associated Communications Corporation at 5; Comments of Omnipoint Communications, Inc. at 7-9.

this degree of openness has permitted new technologies and concepts to be outlined in detail in the context of both experimental reports and pioneer preference filings, and then to be tested under the scrutiny of competing parties. This process aided immensely in advancing the collective thinking the various industries interested in PCS, and in winnowing out at an earlier stage technologies and concepts which were unlikely to be viable.

As one compelling illustration, at the earliest stages of PCS, the service was viewed as an enhancement of cordless telephone service aimed primarily at pedestrian traffic. Cablevision, based on its extensive marketing studies and analysis of PCS as a business, quickly concluded that a service limited to pedestrian speed PCS would simply not be economically viable. This conclusion flowed from the likely cost structure of PCS, combined with limited demand for pedestrian services. Cablevision backed up this basic insight with an extensive research report by Probe Research, which Cablevision made a part of the public record with its experimental report of March 1993. It is now generally accepted that in order to be economically viable, and to compete fully with existing mobile services, PCS must support vehicular speed communications. Following up on this insight, Cablevision has also developed and proved a cost effective cable-based distributed antenna technology which will support vehicular speed communications, and which many in the cable and manufacturing communities, including tentative awardees Cox and Omnipoint, are now exploring.

The other substantial benefit of such an open environment is that the Commission's consideration of policies and rules can be informed by the extensive information disclosed in the course of its consideration of pioneer's preference requests. In the broadband PCS proceeding, the Commission explicitly acknowledged that the information disclosed in the pioneer's preference process had provided significant assistance in its broader policy deliberations.^{2/} Without the open environment fostered by the pioneer's preference proceeding, many parties, including Cablevision, would have treated their internal analyses, not to mention the status of their developmental efforts, as closely guarded trade secrets. This information, however, often has important policy implications. For example, in the summer of 1993, Cablevision conducted detailed cost analyses of its cable-based distributed antenna architecture using a typical suburban environment in Long Island. While these analyses demonstrated substantial savings over traditional PCS architectures, Cablevision's results indicated that even with these benefits, the Commission needed to carefully consider its licensing structure and the number of PCS service providers to ensure that new PCS entrants do not suffer from insuperable economic

^{2/} In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, Tentative Decision and Memorandum Opinion and Order, 7 FCC Rcd. 7794 (1992).

handicaps. These findings in turn were considered in the course of formulating PCS rules.^{3/}

Cablevision also agrees with a number of commentators who question the premise of the NPRM that innovators will necessarily be able to raise sufficient capital to bid in auctions.^{4/} Particularly in the context of smaller entrepreneurial companies, financing may be difficult to obtain, or may entail so much dilution of the original entrepreneurs as to substantially reduce incentives to pursue innovations. The possibility of gaining a pioneer's preference, on the other hand, provides a significant additional incentive by holding out the possibility of additional financial rewards from one's efforts.

In short, there is a substantial basis for concluding that the pioneer's preferences remain an important means of achieving the Commission's statutory obligation to promote the development of new and innovative technologies.

II. The Initial Comments Confirm That Award Of A 20 MHz Basic Trading Area License To Broadband PCS Pioneers Would Appropriately Balance Competing Policy Considerations

As Cablevision argued in its initial comments, assuming the pioneer's preference is retained at least for those services in which tentative awards have been made, the Commission should

^{3/} See Review of the Pioneer's Preference Rules, Notice of Proposed Rulemaking, FCC No. 93-477 (released October 21, 1993), Statement of Commissioner Andrew C. Barrett, Dissenting in Part/Concurring in Part at 3 n.6 (citing results of Cablevision cost studies).

^{4/} Comments of Celsat, Inc. at 8; Comments of Suite 12 Group at 13; Comments of Satellite CD Radio, Inc. at 11.

carefully select an appropriate award for broadband PCS pioneers, whoever they may finally be determined to be, which is consistent with the goal of creating incentives for innovators, while not granting awardees an undeserved windfall. Not surprisingly, the tentative awardees in the broadband PCS service continue to argue for excessive awards based on irrelevant considerations.

Cablevision's conclusion that award of a 20 MHz BTA license best serves the objectives of the pioneer's preference policies was based upon the need to create significant economic incentives. A number of initial commentators pointed out another important consideration which dictates limiting the scope of pioneer's preference awards. These parties note that under a regime of competitive bidding, non-pioneers will be required to pay substantial amounts simply to acquire licenses. In the context of PCS, as Cablevision's analyses of the capital costs of building out a PCS network demonstrate, this up front payment must be followed by substantial additional investments in order to bring PCS service to the marketplace. Several commentators correctly observe that a pioneer's preference awardee whose costs for a license are substantially reduced or eliminated will have a significant competitive advantage in the marketplace.^{5/}

Cablevision disagrees, however, with the conclusion drawn by several of these parties, that pioneer's preferences should be abolished. Any significant financial incentive provided to

^{5/} See, e.g., Comments of GTE Service Corporation at 4; Comments of Paging Network, Inc. at 13.

pioneers will confer some competitive advantage. Rather than concluding that no such incentives should be granted, the Commission should, rather, make sure that the award is not so substantial so as to excessively tilt the playing field. Cablevision believes that award of a 20 MHz Basic Trading Area license strikes an appropriate balance. Such a "free" license obviously has significant value, and creates significant incentives. On the other hand, since most participants in the PCS marketplace are unlikely to confine themselves to a single BTA, the benefits of this preference would be spread over broader operations, thus limiting competitive advantages in any single market. That such a license strikes an appropriate balance is confirmed by perhaps the only truly disinterested party who submitted initial comments, the "father" of the pioneer preference, Henry Geller, who supports award of 20 MHz BTA licenses for broadband PCS pioneers.^{6/}

Mr. Geller's comments also provide a persuasive answer to the only marginally substantive objection to the grant of a 20 MHz BTA license, that it might somehow be inconsistent with the preference scheme envisioned for that frequency block.^{7/} As Mr. Geller points out, award of three, or even several more broadband PCS pioneer preferences, would still leave well over 400 BTA licenses available for designated entities.^{8/} Cablevision would

^{6/} See Comments of Henry Geller at 4-5.

^{7/} See Comments of American Personal Communications at 17.

^{8/} Id. at 5.

add that there is nothing in the legislative provisions requiring opportunities for designated entities that suggest that the Commission should reserve licenses in every market in the country for such entities.

Not surprisingly, the tentative awardees continue to press for far more substantial awards, i.e., a 30 MHz MTA license. Stripped to their essentials, the arguments of these parties amount to simple statements of desire, rather than compelling public policy arguments. Thus, Cox suggests that it should be awarded a preference commensurate with its "business plans."^{9/} This suggestion is bankrupt. As Cablevision argued in its initial comments, as well as its earlier ex parte letter to the FCC on October 5, 1993, pioneer preferences were not created to match the whims and desires of innovators, but rather to achieve public policy objectives. The FCC is not, and cannot, be bound by unilaterally created "business plans" of tentative awardees.


CONCLUSION

For the foregoing reasons, Cablevision supports retention of the Commission's pioneer preference policies, with procedural modifications designed to ensure that decisions are not made prematurely and based on inadequate information. The Commission should strictly apply its pioneer preference standards to ensure that only true innovators receive awards, and this strict

^{9/} See Comments of Cox Enterprises, Inc. at 13.

application should extend to both tentatively awarded preferences
and future preferences.

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CERTIFICATE OF SERVICE

I, James A. Kirkland, hereby certify that a copy of the foregoing Reply Comments of Cablevision Systems Corporation has been sent by United States mail, first class and postage prepaid, to the following on this 22nd day of November, 1993:

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